APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 91-1342WM, 91-1343WM

No. 91-1342WM

KONRAD RADASZEWSKI, by CECELIA RADASZEWSKI,
his duly appointed guardian of the
person and estate,

Appellant,

v.

TELECOM CORPORATION,

Appellee,

and FLEXI-VAN LEASING, INC.

No. 91-1343WM

KONRAD RADASZEWSKI, by CECELIA RADASZEWSKI,
his duly appointed guardian of the
person and estate,

Appellee,

v.

TELECOM CORPORATION,

Appellant,

and FLEXI-VAN LEASING, INC.

On Appeal from the United States District Court
for the Western District of Missouri

Submitted: June 11, 1992

Filed: November 12, 1992

Before RICHARD S. ARNOLD, Chief Judge, HEANEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

This is an action for personal injuries filed on behalf of Konrad Radaszewski, who was seriously injured in an automobile accident on August 21, 1984. Radaszewski, who was on a motorcycle, was struck by a truck driven by an employee of Contrux, Inc. The question presented on this appeal is whether the District Court had jurisdiction over the person of Telecom Corporation, which is the corporate parent of Contrux. This question depends, in turn, on whether, under Missouri law, Radaszewski can "pierce the corporate veil," and hold Telecom liable for the conduct of its subsidiary, Contrux, and Contrux's driver. The District Court held that it lacked jurisdiction. We agree, though for different reasons.

I.

In general, someone injured by the conduct of a corporation or one of its employees can look only to the assets of the employee or of the employer corporation for recovery. The shareholders of the corporation, including, if there is one, its parent corporation, are not responsible. This is a conscious decision made by the law of every state to encourage business in the corporate form. Obviously the decision has its costs. Some injuries are going to go unredressed because of the insolvency of the

corporate defendant immediately involved, even when its shareholders have plenty of money. To the general rule, though, there are exceptions. There are instances in which an injured person may "pierce the corporate veil," that is, reach the assets of one or more of the shareholders of the corporation whose conduct has created liability. In the present case, the plaintiff seeks to hold Telecom Corporation liable for the conduct of an employee of its wholly owned subsidiary, Contrux, Inc.

Under Missouri law, a plaintiff in this position needs to show three things. The leading case is *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986). The Missouri Court of Appeals had this to say:

> A tripartite test has been developed for analysis of the question. To "pierce the corporate veil," one must show;
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transactions attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 284.[1]

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[1] In a submission made shortly after the oral argument under Fed. R. App. P. 28(j), plaintiff claims that only a two-part test

It is common ground among all parties that Telecom, as such, has had no contact with Missouri. If it is subject to jurisdiction over its person in Missouri courts, it is only because of the conduct of Contrux, its subsidiary. So the issue of jurisdiction over the person depends on whether the corporate veil of Contrux can be pierced to bring Telecom into the case. As it happens, this is also the question upon which Telecom's substantive liability depends. (We assume for present purposes that Contrux is liable—this has not yet been proved.) Telecom raised the issue by filing a motion to dismiss the complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(2) and for failure to state a claim under 12(b)(6). The parties have treated the matter as one of jurisdiction, and so will we, but in fact the underlying issue is the same: is Telecom liable for what Contrux did? [2]

Initially, the District Court granted Telecom's motion to dismiss on the ground that the first element of the

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must be met. He cites *Jack Swall v. Custom Automotive Services, Inc.*, No. W.D.44788 (Mo. App., W.D. April 28, 1992), in an attempt to prove that the third element quoted in text from *Collet*, the element of proximate cause, is no longer part of the law of Missouri. We doubt the validity of this claim. *Swall* does not cite *Collet*, and, under the facts of *Swall*, the element of proximate cause was clearly met. It is true that *Swall*, when setting out the "test" under Missouri law, mentions only the first two of the *Collet* elements, but we are inclined to think that this was done simply because only the first two of the elements were in issue in *Swall*. In any case, our decision on this appeal does not turn on the third element, so we need not pursue this line of analysis.

[2] The complaint named as a defendant, in addition to Telecom, Contrux, and Contrux's driver, Flexi-Van, Inc., the owner of the trailer that Contrux was leasing, and that was involved in the accident. In addition to moving to dismiss the complaint, Telecom also moved to dismiss a cross-claim filed against it by Flexi-Van. The District Court denied this motion, but this action is not before us on appeal. All claims by or against Flexi-Van, Inc., have been settled.

Collet formulation, control, had not been met. This ruling was certified for interlocutory appeal under 28 U.S.C. § 1292(b), and we reversed. *Radaszewski v. Contrux, Inc.*, 891 F.2d 672 (8th Cir. 1989). We held that, at least as a matter of pleading, Radaszewski had alleged sufficient facts to satisfy the requirement of control. We further held that the District Court had not allowed plaintiff enough time for discovery. The judgment dismissing the complaint was reversed, and the cause remanded for additional discovery and for reconsideration by the District Court of the motion to dismiss. On remand, we said, plaintiff would need

> to show that Telecom's control of Contrux and Contrux's undercapitalization [this term, as we shall see, is used as a sort of proxy for the second element of the *Collet* formulation—improper motive] proximately caused his injury in order for the district court to exercise personal jurisdiction over Telecom.

891 F.2d at 675.

The District Court has now permitted the additional discovery, and we have a full documentary record. It has also reconsidered the motion to dismiss, and has again granted it. As to the second element of the *Collet* test (improper or unjust use of the subsidiary), the District Court held that plaintiff had made a sufficient showing to survive a motion to dismiss. But as to the third element, proximate cause, the District Court ruled for the defendant. No injury has been caused to the plaintiff by Telecom's control and use of its subsidiary, the Court reasoned, because the plaintiff has not yet established that the subsidiary is liable to him for anything. Only if liability is established, and plaintiff then unsuccessfully attempts to collect from Contrux, would it appear that the parent's misuse of the corporate form, as, for example, by putting Contrux into business with insufficient capital, had done any harm to Radaszewski. On this

basis, the District Court dismissed the complaint of Radaszewski against Telecom for lack of jurisdiction over Telecom's person. The dismissal was without prejudice, presumably on the theory that, if Radaszewski should establish Contrux's liability to him, and if the judgment should be uncollectible, Radaszewski could then re-file against Telecom. This ruling, like the previous one, was certified for interlocutory appeal under 28 U.S.C. § 1292 (b). We granted leave to appeal, and the case is again before us.

II.

For convenience, we quote again the second element of the *Collet* formulation. In order to pierce the corporate veil, a plaintiff must show, among other things, that the defendant's control of a subsidiary has

> been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights . . . .

Collet, 708 S.W.2d at 284. To satisfy this second element, plaintiff cites no direct evidence of improper motivation or violation of law on Telecom's part. He argues, instead, that Contrux was undercapitalized.

Undercapitalizing a subsidiary, which we take to mean creating it and putting it in business without a reasonably sufficient supply of money, has become a sort of proxy under Missouri law for the second *Collet* element. On the prior appeal, for example, we said that "Missouri courts will disregard the existence of a corporate entity that is operated while undercapitalized." 891 F.2d at 674. *Accord, Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379 (Mo. App. 1987); *Collet, supra*, 728 S.W.2d at 286-87. The reason, we think, is not because undercapitalization, in and of itself, is unlawful (though it may be for some purposes), but rather because the creation of an undercapitalized subsidiary justifies an inference that

the parent is either deliberately or recklessly creating a business that will not be able to pay its bills or satisfy judgments against it. This point has been made clear by the Supreme Court of Missouri. In *May Department Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 327, 107 S.W.2d 41, 55 (1937), the Court found an improper purpose in a case where a corporation was "operating it without sufficient funds to meet obligations to those who must deal with it." Similarly, in *Consolidated Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801 (8th Cir. 1964), we said:

> Making a corporation a supplemental part of an economic unit and operating it without sufficient funds to meet obligations to those who must deal with it would be circumstantial evidence tending to show either an improper purpose or reckless disregard of the rights of others.

Id. at 806-07.

Here, the District Court held, and we assume, that Contrux was undercapitalized in the accounting sense. Most of the money contributed to its operation by Telecom was in the form of loans, not equity, and, when Contrux first went into business, Telecom did not pay for all of the stock that was issued to it. This is a classic instance of watered stock, of putting a corporation into business without sufficient equity investment. Telecom in effect concedes that Contrux's balance sheet was anemic, and that, from the point of view of generally accepted accounting principles, Contrux was inadequately capitalized. Telecom says, however, that this doesn't matter, because Contrux had $11,000,000 worth of liability insurance available to pay judgments like the one that Radaszewski hopes to obtain. No one can say, therefore, the argument runs, that Telecom was improperly motivated in setting up Contrux, in the sense of either knowingly or recklessly establishing it without the ability to pay tort judgments.

In fact, Contrux did have $1,000,000 in basic liability coverage, plus $10,000,000 in excess coverage. This coverage was bound on March 1, 1984, about five and one-half months before the accident involving Radaszewski. Unhappily, Contrux's insurance carrier became insolvent two years after the accident and is now in receivership. (This record does not show the financial status of the receivership. We thus do not know whether any money would ever be available from the insurance company to pay a judgment in favor of Radaszewski, if he obtains one.) But this insurance, Telecom points out, was sufficient to satisfy federal financial-responsibility requirements. Under 49 C.F.R. § 387, motor carriers must maintain "financial reserves (e.g., insurance policies or surety bonds) sufficient to satisfy liability amounts set forth in this subpart covering public liability." 49 C.F.R. § 387.5. It is undisputed that the amount of insurance maintained by Contrux exceeded federal requirements, and that Contrux, at all times during its operations, was considered financially responsible by the relevant federal agency, the Interstate Commerce Commission.

The District Court rejected this argument. Undercapitalization is undercapitalization, it reasoned, regardless of insurance. The Court said:

> The federal regulation does not speak to what constitutes a properly capitalized motor carrier company. Rather, the regulation speaks to what constitutes an appropriate level of *financial responsibility.*

Konrad Radaszewski v. Contrux, Inc., No. 88-0445-CV-W-1 (W.D. Mo. Oct. 26, 1990), slip op. 7 n.6 (emphasis in original). This distinction escapes us. The whole purpose of asking whether a subsidiary is "properly capitalized," is precisely to determine its "financial responsibility." If the subsidiary is financially responsible, whether by means of insurance or otherwise, the policy

behind the second part of the *Collet* test is met. Insurance meets this policy just as well, perhaps even better, than a healthy balance sheet.

At the oral argument, counsel for Radaszewski described the insurance company in question as "fly-by-night." He pointed out, and this is in the record, that the insurance agency that placed the coverage, Dixie Insurance Agency, Inc., was, like Contrux, a wholly owned subsidiary of Telecom. (Apparently the $1,000,000 primary policy is still in force. It is only the $10,000,000 excess policy that is inoperative on account of the insolvency of the excess carrier, Integrity Insurance Co.) Plaintiff argues that if the case went to trial he could show that the excess carrier "was an insurance company with wobbly knees for years before its receivership." Reply Brief of Appellant 9. He also says that the excess carrier was not strong enough even to receive a minimum rating in the Best insurance guide. Finally, plaintiff suggests that Contrux bought "its insurance from a financially unsound company which most certainly charged a signficantly lower premium." Reply Brief of Appellant 10.

The dissent, *Post* at ——, raises certain questions about the adequacy of the insurance coverage purchased by Contrux. In our view, a careful reading of the record does not bear out the contentions made. In the first place, Contrux unquestionably had good basic coverage of $1,000,000 from the insurance company of the State of Pennsylvania, an insurer whose solvency is not questioned. III Joint App. 756. For this coverage Contrux apparently paid a premium of $17,000. No suggestion is made that this premium was not adequate. It is true that the excess carrier, Integrity Insurance Co. (not Integral), did not receive a Best's rating in 1985 and 1986. The relevance of this information is dubious at best. Importantly, the information was not available to Contrux when it purchased insurance from Integrity in

1983, or when it renewed the insurance in 1984. There is no evidence in the record as to whether a Best's rating was given in the 1984 publication. The accident in question happened in 1984. Events occurring thereafter are of tenuous relevance to Contrux's state of mind at the time of the purchase of the insurance. Recall that under *Collet* some evidence of improper motive is required to satisfy one of the elements necessary for piercing the corporate veil.

The dissent argues that Telecom, or Contrux, paid only a $4,000 premium for the entire coverage of $11,000,000. This overlooks the fact, recounted above, that a separate and far more substantial premium was paid for the $1,000,000 in basic coverage. As we read the available information, Contrux paid a premium of $4,900 for $10,000,000 in excess coverage for the year beginning March 1, 1983. III Joint App. 754. For the next year, the year in which the accident occurred, the same coverage costs $5,480. *Id.* at 755. There is no evidence in this record, by way of opinion testimony or otherwise, that these premiums are below the market level. It is true that Integrity incurred operating losses in 1983 and 1984, see III Joint App. 653, but the same page of the record reveals that Integrity's financial position improved almost twofold in the year 1984. Its surplus funds at the close of 1983 were $25,374,000. At the end of 1984, these funds reached $40,526,000. *Ibid.* Accordingly, we see no basis whatever for suspecting that Integrity was insolvent at the time the insurance was purchased. The company had been in business since 1958 and was licensed in the District of Columbia and all states. As of the end of 1985, there was still a policyholders' surplus of $20,514,000. *Id.* at 655. This information, in our view, supports at most an inference that Contrux may have made an error in business judgment in placing its excess coverage with Integrity. It furnishes no genuine support for an inference of improper purpose.

At this point it is appropriate to note the proper standard to apply in assessing factual claims in the present procedural status of this case. The District Court dismissed the complaint under Fed. R. Civ. P. 12(b)(2) for want of jurisdiction over the person of Telecom. In doing so, however, it did not rely solely on the pleadings. It had before it and relied also on other material, including affidavits and depositions. We have, therefore, in substance, what amounts to a motion for summary judgment on the issue of jurisdiction over the person. The question before the District Court, and before us on appeal, is simply whether Radaszewski has raised any genuine issue of fact material to the question of personal jurisdiction over Telecom. If he has not, there is no point in a trial, and if the case went to trial, with no more evidence than we presently have before us, the issue of personal jurisdiction over Telecom would never get to the jury: Telecom would be entitled to a directed verdict, on the ground that no rational trier of fact could find personal jurisdiction over it. Jurisdiction, to be sure, is a "question of law," in an abstract sense, but it often, as here, turns on questions of fact. What degree of control did Telecom exercise over Contrux? Was Contrux undercapitalized? Did Telecom's conduct with respect to Contrux proximately cause any injury to the plaintiff? Thus, as with every other question of fact, a court, when faced with a pre-trial motion for judgment as a matter of law, must ask itself whether there is any genuine issue. If there is not, the motion should be granted. If there is, the case should go forward and be tried. Both parties cite authorities to the effect that, before trial, a plaintiff need show only a "prima facie case" on jurisdiction. This somewhat confusing formulation means, we think, only that a complaint should not be dismissed for want of jurisdiction, before trial, if there is any genuine issue as to any fact material to the jurisdictional question.

Thus, in *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977), we said:

> While the facts adduced in a Rule 12(b)(2) Motion to Dismiss for lack of personal jurisdiction must be viewed in the light most favorable to the party opposing the motion, there must nonetheless be some evidence upon which a prima facie showing of jurisdiction may be found to exist, thereby casting the burden upon the moving party to demonstrate a lack of personal jurisdiction.

This is the same standard as the one we apply on motions for summary judgment under Rule 56. We look at the facts in the light most favorable to the party opposing the motion, give him the benefit of all reasonable inferences, and grant the motion only if there is no genuine issue as to any material fact, so that the moving party is entitled to judgment as a matter of law. So here, though the motion is captioned under Rule 12(b)(2) rather than under Rule 56, the analytical process is the same as that used on a motion for summary judgment. We look at the facts relevant to the issue of jurisdiction in the light most favorable to Radaszewski, give him the benefit of all reasonable inferences from these facts, and deny the motion to dismiss if the record, viewed in this way, raises any genuine issue of fact material to the issue of of jurisdiction.

We are convinced that this record raises no such issue. Insurance is unquestionably relevant on the issue of "undercapitalization." The existence of insurance goes directly to the question of the subsidiary's financial responsibility. If a parent has established a financially responsible subsidiary, then that subsidiary is not "undercapitalized" in the only sense that matters for present purposes. That subsidiary, in other words, is not unable to meet its obligations. It therefore cannot have been established by the parent, either deliberately or recklessly,

in an effort to avoid obligations or to make then difficult to collect. The improper-conduct or motivation portion of the *Collet* test cannot be met. Here, it is beyond dispute that Contrux had insurance, and that it was considered financially responsible under the applicable federal regulations. We see nothing sinister in the fact that the insurance was purchased through an agency wholly owned by Telecom. This is a common business practice. The assertion that a reduced premium was paid is wholly without supoprt in the record. It is based on speculation only. There is no evidence that Telecom or Contrux knew that the insurance company was going to become insolvent, and no reason, indeed, that we can think of why anyone would want to buy insurance from a company that he thought would become insolvent.

The insolvency, moreover, did not occur until about two years after the accident. The fact that the excess carrier did not have a rating in Best would be sufficient, we suppose, to call into question Contrux's business judgment in selecting the insurance company, but it is not sufficient to raise a *genuine* issue of improper motivation or intent to evade legal obligations. The doctrine of limited liability, after all, is intended precisely to protect a parent corporation whose subsidiary goes broke. That is the whole purpose of the doctrine, and those who have the right to decide such questions, that is, legislatures, believe that the doctrine, on the whole, is socially reasonable and useful. We think that the doctrine would largely be destroyed if a parent corporation could be held liable simply on the basis of errors in business judgment. Something more than that should be shown, and *Collet* requires something more than that. In our view, this record is devoid of facts to show that "something more."

III.

We hold that plaintiff has made no showing of any genuine issue of material fact with respect to the dishonesty or improper-conduct element of the *Collet* test.

In this respect, we disagree with the District Court. We agree, however, with the result reached by that Court. The complaint against Telecom must be dismissed for want of jurisdiction. Additionally, the dismissal should be with prejudice. Under the District Court's rationale, lack of a showing of proximate cause, the defect in personal jurisdiction could be cured later, if Radazewski obtained a judgment against Contrux. Thus, it was consistent for that Court to dismiss the complaint without prejudice. Failure to meet the improper-conduct element of *Collet*, however, is not curable. It does not depend on future events. Plaintiff has had a fair chance to show this element, and he has not succeeded. We therefore affirm the judgment of the District Court dismissing the complaint for want of jurisdiction, but modify that judgment to provide that it is with prejudice as to Radaszewski's complaint against Telecom.

HEANEY, Senior Circuit Judge, dissenting.

I respectfully dissent. The record is more than sufficient to support a prima facie showing that personal jurisdiction over Telecom exists.

Contrux is a wholly owned subsidiary of Telecom. It was organized as a nonunion subsidiary to take advantage of the lower wage and benefit package that such status would permit. It was initially capitalized for only $25,000, even though it was to operate as a nationwide motor carrier with equipment valued at $1,000,000 or more. Tractors and trailers were purchased for Contrux by Telecom. Telecom assumed ultimate responsibility for the payment of the purchase price. Moreover, Telecom periodically advanced money to Contrux for operating expenses or guaranteed payment for such expenses, taking as security for its advances a mortgage on all the tangible assets of Contrux. Contrux's debt to Telecom eventually totaled over $750,000, all of which was secured

in 1985 by a mortgage on all of Contrux's assets, leaving little or nothing for unsecured or judgment creditors.

Contrux had a negative net worth and net operating losses each of the four years that it was actively in business. Most important business decisions involving Contrux were made by Telecom because Contrux had neither the working capital nor the unencumbered assets to permit it to make decisions on its own. In every respect on the basis of the record now before us, Contrux was nothing but a shell corporation established by Telecom to permit it to operate as a nonunion carrier without regard to the consequences that might occur to those who did business with Contrux or those who might be affected by its actions.

Telecom does not challenge the above facts. Rather, it argued that because Contrux obtained $1,000,000 in liability insurance through Telecom, Contrux had sufficient funds to meet its obligations to tort claimants. The district judge rejected this contention, stating:

> Whether a corporation is undercapitalized is a question of fact which turns on the nature of the business of the corporation and the risks that business necessarily faces. . . .
>
> Upon review of all the pleadings and evidentiary materials, the court concludes that plaintiff and Flexi-Van have made a prima facie showing that Contrux was undercapitalized from its inception. This showing has not been rebutted by Telecom's sole assertion that Contrux procured liability insurance in conformity with federal regulation. Furthermore, Telecom has never directly disputed the specific allegations of undercapitalization that have been made by plaintiff and Flexi-Van. As for showing that Contrux was undercapitalized for an improper purpose, the court finds that the evidence submitted on this issue has failed to resolve this material factual

> dispute. Given that a determination of a corporation's financial status is a question of fact, the court finds that the question is best left for the trier of fact to resolve.

The majority rejects the district court's analysis, reasoning that Contrux had liability insurance and thus was considered financially responsible under the applicable federal regulations. In my view, Contrux's liability insurance is a relevant factor to be considered, but a fact finder after a trial might well find that this factor alone does not require a verdict for the defendant.

There are many unanswered questions about the $10,000,000 excess coverage policy purchased from the Integral Insurance Company. First, was Integral solvent at the time the insurance was purchased. The record reveals that Integral incurred large operating losses in 1983 and 1984, that it did not receive a Best rating in 1984 because a substantial portion of its business was reinsured with reinsurers not licensed by the United States, and that it did not receive a Best rating in 1985 because it could not meet minimum standards. The record further reveals that Telecom paid only $4,000 for the $11,000,000 policy procured through its own subsidiary insurance agency. It seems to me that these facts raise an issue as to whether Integral was solvent at the time of purchase and that the issue is one to be developed at trial. Second, what did Telecom know about Integral when it made the purchase. If it knew or reasonably should have known that it was insolvent or nearly so at the time the coverage was purchased, then the insurance did little or nothing to enhance the economic viability of Contrux.

The majority asks why anyone would want to buy insurance from an insolvent company. An answer readily comes to mind. The purchase was a cheap way of complying with federal regulations and furthered the illusion

to all concerned that Contrux was a viable company able to meet its responsibilities. The record does not show that the federal regulating agency determines whether an insurance company is capable of meeting the claims that may be valid against it. The regulation is apparently satisfied simply by filing proof of insurance. Surely Telecom could have determined Integral's ability to meet lawful claims if it had inquired. This issue could be fully developed at trial.

As the matter now stands, the innocent victim may have to bear most of the costs of his disabling injuries without having the opportunity to prove that Contrux was intentionally undercapitalized. I believe this is wrong and inconsistent with Missouri law. I would thus remand for trial.[1]

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[1] Having reached this conclusion, I must deal with the district court's order to dismiss without prejudice because Radaszewski does not yet have a verdict against Contrux and is unable to collect his full damage. I do not believe that the district court's decision is consistent with Missouri law. In *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 746 (Mo.App. 1980), the court said: "it is clear when the action of the dominant corporate renders the subservient corporation insolvent, then the requisite injury and causal connection is established." *Id.* at 287. I would add that it makes little sense to have two trials when all issues can be resolved in one.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 88-0445-CV-W-1

KONRAD RADASZEWSKI,
Plaintiff,

v.

CONTRUX, INC., *et al.*,
Defendants.

ORDER

[Filed Oct. 26, 1990]

Two motions are pending in this case. On April 20, 1990 defendant Telecom Corporation ("Telecom") filed a Motion to Dismiss Plaintiff's First Amended Complaint for lack of personal jurisdiction. On May 9, 1990 Telecom filed a Motion to Dismiss Cross-Claim of Defendant Flexi-Van Leasing, Inc. ("Flexi-Van"). In an Order entered August 27, 1990, this court deferred ruling on Telecom's motions so as to allow the parties to supplement their pleadings on the specific issue of whether "the fact that Contrux procured insurance, by itself, rebuts the allegation of undercapitalization." The parties have complied with this request.[1] For the reasons set forth below, Tele-

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[1] For purposes of clarification, the court orally granted Telecom's request to file a reply to the supplemental briefs the parties were asked to file on September 17, 1990. Although Flexi-Van was not granted leave to file its Augmented Supplemental Suggestions, filed October 2, 1990, it was taken into consideration in ruling on Telecom's motions to dismiss.

com's Motion to Dismiss Plaintiff's First Amended Complaint will be granted and its Motion to Dismiss Cross-Claim of Defendant Flexi-Van Leasing, Inc. will be denied.

I. DISCUSSION

In seeking dismissal of plaintiff's suit and Flexi-Van's cross-claim, Telecom relies on Fed. R. Civ. Pro. 12(b)(2), lack of personal jurisdiction, and 12(b)(6), failure to state a claim upon which relief may be granted.[2] It is the plaintiff's (and in this case, Flexi-Van's) burden of proof to establish jurisdiction over Telecom. *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988). When a motion to dismiss for lack of personal jurisdiction is decided solely on the pleadings and other evidentiary materials submitted to the court, *the plaintiff need only make a prima facie showing* that personal jurisdiction exists. *Stephens v. Coleman*, 712 F. Supp. 1571, 1574 (N.D. Ga. 1989); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1351 (1990).

In response to Telecom's motions, plaintiff and Flexi-Van contend that personal jurisdiction over Telecom exists because defendant Contrux, Inc. ("Contrux") was merely the alter ego of Telecom. Before it can be found that one corporation is the alter ego of another corporation, the party making the allegation must successfully apply the three-prong analysis set out in *Collet v. American National Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. Ct. App. 1986). Earlier, the Court of Appeals for the Eighth Circuit held that plaintiff successfully established the first element of the alter ego analysis—that Telecom exercised such control over Contrux that the two entities acted as one. *See* Slip Op. at 4-5. Two additional ele-

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[2] In briefing its motions, Telecom has relied exclusively on the issue of personal jurisdcition in arguing for dismissal. As a consequence, the court's ruling hinges on the resolution of this issue alone.

ments, necessary to finding an alter ego relationship, remain to be decided. These elements are: 1) establishing that the control exercised by the parent over the subsidiary corporation was used to commit fraud wrong, a violation of a statutory or other legal duty, and 2) establishing that the control and breach of duty proximately caused the injury or unjust loss complained of. *Collet*, 708 S.W.2d at 284.

A. *Issue of Capitalization*

Plaintiff and Flexi-Van argue that the second element of the alter ego analysis is met because Telecom failed to adequately capitalize Contrux. In response, Telecom contends that its purchase of liability insurance in excess of the requirements set forth under the Minimum Levels of Financial Responsibility for Motor Carrier, 49 C.F.R. § 387 (1981), rebuts the allegation that Contrux was undercapitalized from its inception. Telecom goes on to say it would be "inconsistent" to find that Contrux was undercapitalized when it was "financially responsible," as defined by federal regulation. *See* Telecom's Supplemental Reply Brief at 2.

The parties are not in agreement on what it means for a corporation to be undercapitalized. In its supplemental brief, Flexi-Van acknowledges that "no court has undertaken to define, describe or characterize the terms "capitalization' or 'undercapitalization.'" *See* Supplemental Suggestions of Flexi-Van at 7. Flexi-Van goes on to suggest that the lack of a definition is due, in large part, to the fact that the words are "terms of art peculiar to the accounting profession." *Id.* Consistent with that explanation, both Flexi-Van and plaintiff[3] suggest that

[3] Plaintiff adopts and incorporates as its own Flexi-Van's argument that generally accepted accounting principles should be applied in analying Contrux's financial condition. *See* Further Suggestions in Opposition of Motion to Dismiss at 2.

ordinary accounting principles should be applied in determining whether Contrux was undercapitalized. In support thereof, they attach the affidavit of John M. Meara, a certified public accountant, who concluded upon review of Contrux's financial statements that the subsidiary "began its existence as an insolvent company and continued through its life as an insolvent company." *See* Affidavit of John W. Meara at 3.[4] Telecom does not directly attack Mr. Meara's affidavit.[5] Rather, Telecom avers that the reliance placed on the affidavit does not alter the fact that

> Contrux's purchase of liability insurance, far above minimum standards required by federal law, establishes that Telecom had no improper purpose or motive in its dealings with Contrux, particularly in regard to potential tort claimants such as plaintiff.

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[4] In an earlier pleading plaintiff presents a detailed summary of the capitaliation of Contrux. The summary includes an overview of the subsidiary's initial capitalization, as well as the number and size of inter-company cash advances made by Telecom to Contrux—some of which were eventually written off as losses by Telecom. Plaintiff also alleges that Telecom routinely served as guarantor of contracts entered into by Contrux. Additionally, plaintiff alleges that right after Contrux's corporate charter was dissolved, Telecom converted its status as an unsecured creditor to one as a secured creditor. *See* Plaintiff's Suggestion in Opposition at 15-23.

[5] Telecom, in its reply to plaintiff's suggestions opposing the motion to dismiss, also declined to directly respond to plaintiff's allegations about Contrux being undercapitalized. Instead, Telecom states that plaintiff ignores "the fundamental rule that in ruling on a motion to dismiss this Court limits its review to an examination of the facts alleged in plaintiff's Complaint. . . . For this reason Telecom need not respond to the many misstatements in plaintiff's discussion of the 'evidence.'" *See* Telecom's Reply to Plaintiff's Suggestions in Opposition at 2. Telecom misstates the rule on what evidence a court may consider in ruling on a motion to dismiss for lack of personal jurisdiction. A court may consider affidavits and any other relevant material, as well as the pleadings, in resolving the jurisdiction issue. *See* 5A C. Wright & A. Miller, Federal Practice & Procedure § 1351 at 253 & n.31.

> Undercapitalization may be evidence of an improper purpose, but only in cases where it demonstrates an intent to defeat the claims of lawful creditors or others who must deal with a corporation.

See Telecom's Supplemental Reply Brief at 5.

Throughout the discussion of whether Contrux was adequately capitalized, Telecom has exclusively relied on the fact that Contrux obtained liability insurance in excess of the federal requirements for motor carriers of property. This fact alone, Telecom argues, rebuts any testimony to the effect that Contrux was undercapitalized from its inception. In so providing, Telecom looks to the language of *May v. Department Stores, Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41, 55 (Mo. 1937), which provides that where a corporation is operated "without sufficient funds *to meet obligations to those who must deal with it*[,] [that] would be circumstantial evidence tending to show either improper purpose or reckless disregard of the rights of others." (Emphasis added). Because Contrux had sufficient funds to meet its obligations to tort claimants (in the form of liability insurance), Telecom concludes that the corporation was not undercapitalized. Alternatively, Telecom asserts, even if one were to accept as true plaintiff's and Flexi-Van's allegations that Contrux was undercapitalized, the parties still fail under the second prong of the *Collet* test because the purchase of insurance would weigh against a finding that Telecom had an "improper purpose" or motive for undercapitalizing Contrux. *See* Telecom's Supplemental Reply Brief at 5.

Whether a corporation is undercapitalized is a question of fact which turns on the nature of the business of the corporation and the risks that business necessarily faces. 1 Fletcher Cyclopedia of the Law of Private Corporations § 44.1 (rev. 1990). In determining what factors may be taken into consideration, one state supreme court cited to

a law review discussion of undercapitalization as guidance:

> Whatever the courts' requirements in terms of inadequacy of assets, courts must still consider *many varying factors* relevant to their deliberations. . . . where the inadequacy of capital and other assets is at issue the testimony of expert financial analysts and statisticians as to comparable businesses maybe relevant. *Perhaps this analysis might include evidence of the adequacy of insurance coverage*, and involve testimony concerning the amounts of insurance carried by comparable businesses.

(Emphasis added). *Atlas Construction Co. v. Slater*, 746 P.2d 352, 358 (Wyo. 1989) (quoting Gelb, *Piercing the Corporate Veil—The Undercapitalization Factor*, 59 Chicago-Kent L. Rev. 4, 14-15 (1982)). It has also been said that an analysis of a corporation's financial condition should emphasize "economic viability rather than an inflexible computation of minimal capitalization." 1 Fletcher Cyclopedia of the Law of Private Corporations § 44.1 at 812. Thus, a corporation would be undercapitalized when "there is an obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking." *Id.*

Upon review of all the pleadings and evidentiary materials, the court concludes that plaintiff and Flexi-Van have made a prima facie showing that Contrux was undercapitalized from its inception. This showing has not been rebutted by Telecom's sole assertion that Contrux procured liability insurance in conformity with federal regulation.[6] Furthermore, Telecom has never di-

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[6] Telecom's suggestion that Contrux was adequately capitalized because it "exceeded the motor carrier industry standard for financial responsibility" misrepresents the purpose of 49 C.F.R. § 387. *See* Telecom's Supplemental Brief at 6. The federal regulation does not speak to what constitutes a properly capitalized motor carrier

rectly disputed the specific allegations of undercapitalization that have been made by plaintiff and Flexi-Van. As for showing that Contrux was undercapitalized for an improper purpose, the court finds that the evidence submitted on this issue has failed to resolve this material factual dispute. Given that a determination of a corporation's financial status is a question of fact, the court finds that the question is best left for the trier of fact to resolve.

B. *Proximate Causation*

The final element required before finding that an alter ego relationship exists is one of proximate causation. The specific language used by the court in *Collet* provides that the "aforesaid control and breach of duty *must proximately cause the injury or unjust loss complained of.*" *Collet*, 708 S.W.2d at 284 (emphasis added). In reliance on this language, the court of appeals, in its opinion reversing the court's order of dismissal, states that in the event plaintiff ascertains facts to establish Contrux was undercapitalized

> . . . he also will have to show that *Telecom's control of Contrux and Contrux's undercapitalization proximately caused his injury* in order for the district court to exercise personal jurisdiction over Telecom.

Slip op. at 6 (emphasis added).

1. Plaintiff's Alleged Injury

Plaintiff claims that the injury proximately caused by Contrux's undercapitalization is his inability to "collect his full damages from Contrux because of its insolvency."

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company. Rather, the regulation speaks to what constitutes an appropriate level of *financial responsibility*. The regulation defines financial responsibility as "the financial reserves (e.g., insurance policies or surety bonds) *sufficient to satisfy liability* amounts set forth in this subpart covering public liability." 49 C.F.R. § 387.5 (emphasis added).

See Plaintiff's Suggestions in Opposition at 13. In response, Telecom argues that the injury plaintiff alleges proximately flows from Contrux's alleged undercapitalization is merely speculative in nature. The claimed injury hinges on two things: 1) that plaintiff obtain a verdict against Contrux, and 2) that plaintiff subsequently is unable to collect his full damages from Contrux. Since plaintiff has not obtained a verdict against Contrux, Telecom continues, his claimed injury is at best "unliquidated" and fails to support an allegation of proximate causation under the third prong of the *Collet* test.

Based on the criteria set forth in *Collet* and restated by the Eighth Circuit in its opinion, the court finds that plaintiff has failed to allege he suffered an injury proximately caused by Contrux's alleged undercapitalization. Plaintiff provides no authority in support of the proposition that an unliquidated claim may be used to establish proximate causation. In fact, plaintiff admits as much to the contrary. In his brief in opposing Telecom's motion to dismiss, plaintiff states:

> The long and the short of it is if the plaintiff is successful in convincing the jury that they should find for plaintiff *and* the corporate veil protecting Telecom should be pierced, then jurisdiction will lie. If the plaintiff is unsuccessful, there is no jurisdiction over Telecom.

Plaintiff's Suggestions in Opposition at 6 (emphasis added). The language used in *Collet* likewise fails to support the view that a speculative injury would fulfill the proximate causation element. The *Collet* court speaks of the injury "complained of." One cannot seek recompense for an injury that has yet to occur. Consequently, the court finds it has no personal jurisdiction over Telecom in the action brought by plaintiff.

2. Flexi-Van's Alleged Injury

Flexi-Van alleges that it suffered an injury when Contrux failed to carry out the terms of a contract the two

parties entered into. In June 1984 Flexi-Van and Contrux entered into a leasing agreement whereby Flexi-Van leased certain vehicles to Contrux for use in its motor carrier business. The leasing agreement contained an indemnification clause which provided in pertinent part:

> "Lessee [Contrux] . . . at its sole cost and expense, assume full responsibility for and does agree to defend and hold Lessor [Flexi-Van] free and harmless against any and all liability, claim, demand, suit, action or proceeding . . . for death, injury or damage to property or person, arising out of the use, operation, maintenance, transportation, and possession of the Equipment by Lessee . . . and Lessee further agrees to defend, at its sole expense, all claims arising out of such injuries or damages."

Flexi-Van asserts the leasing agreement was breached when Contrux failed, upon request, to defend and indemnify Flexi-Van in the present matter. Contrux failed to fulfill its contractual indemnity obligations because it was undercapitalized and unable to do so. Telecom's response is that like plaintiff's injury Flexi-Van's injury is merely speculative. Telecom argues that Flexi-Van's right to indemnification under the leasing agreement is "entirely dependent upon a judgment against it. Without a judgment, Flexi-Van has no indemnification right, and cannot state a claim upon which relief can be granted." *See* Brief in Support of Telecom's Motion to Dismiss at 7.

Based upon the plain language of the leasing agreement Flexi-Van has been injured by Contrux's failure to represent and defend Flexi-Van in the current suit. Telecom's suggestion that the indemnity clause is not triggered until a judgment is entered against Contrux and Flexi-Van is not supported by the text of the clause. As quoted above, Contrux, as lessee under the contract, had a duty "to defend, at its sole expense, all claims arising out of such injuries or damages." Clearly, a party's duty to defend cannot be contingent upon on event

occurring after the fact—in this case, the entry of a judgment. The court also finds it plausible that Contrux's refusal to honor the indemnity clause provision may have been precipitated by its undercapitalized condition. Thus, the court concludes that Flexi-Van has made a prima facie showing that it sustained an injury and that injury was proximately caused by Contrux's alleged undercapitalization.

II. CONCLUSION

Therefore, it is

ORDERED that Telecom's Motion to Dismiss Plaintiff's First Amended Complaint is granted. It is further

ORDERED that Telecom's Motion to Dismiss Cross-Claim of Defendant Flexi-Van Leasing, Inc. is denied. It is further

ORDERED that defendant Flexi-Van's and plaintiff's requests for an oral argument on the pending motions for dismissal, pursuant to Local Rule 13F, is denied as moot.

/s/ Dean Whipple
DEAN WHIPPLE
United States District Judge

DATED: OCTOBER 25, 1990.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1013

KONRAD RADASZEWSKI, by CECILIA RADASZEWSKI, his duly appointed guardian of the person and estate,
Appellant,

v.

CONTRUX, INC., DAN LESLIE SATTERFIELD; TELCOM CORPORATION,
Appellees.

FLEXI VAN LEASING, INC.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: February 13, 1989

Filed: December 13, 1989

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

HEANEY, Senior Circuit Judge.

Konrad Radaszewski appeals from the order of the district court sustaining defendant Telecom Corporation's (Telecom) motion to dismiss for lack of personal jurisdiction. We reverse and remand.

BACKGROUND

Radaszewski suffered a permanent brain injury when a truck driven by Dan Leslie Satterfield, an employee of Contrux, Inc. (Contrux), struck him by the side of a road in Independence, Missouri. Contrux was a wholly-owned subsidiary of Telecom. Telecom and Contrux both were incorporated under the laws of Texas, but Contrux is insolvent and no longer in good standing. Telecom does no business in Missouri and has no other connections with the state. Radaszewski is a resident of Wisconsin.

Radaszewski originally brought this tort action in Missouri state court. He claims jurisdiction under Missouri's long-arm statute, which provides personal jurisdiction over a foreign defendant who has committed a tort in Missouri. *See* Mo. Ann. Stat. § 506.500 (Vernon Supp. 1988). He claims that Telecom's corporate veil should be pierced to attribute the tort of Satterfield, Contrux's agent, to Telecom. Radaszewski alleges that Telecom should be held liable for the tort attributable to Contrux because Telecom was the sole owner of Contrux, Contrux was undercapitalized, and Contrux merely served as Telecom's alter-ego and was not really a separate corporation.

The district court determined that Radaszewski had alleged insufficient facts to show that Contrux and Telecom were not separate corporations. Consequently, Radaszewski had failed to establish a prima facie case that Telecom had committed a tort in Missouri. Because Radaszewski had failed to connect Telecom to Satterfield's tort, the district court granted Telecom's motion to dismiss for lack of personal jurisdiction.

Radaszewski moved the district court to reconsider its order of dismissal because he had been unable to obtain discovery sufficient to establish the factual basis necessary for an exercise of personal jurisdiction. In the alternative, Radaszewski moved that the order of dismissal be designated immediately appealable pursuant to 28 U.S.C. § 1292(b) (1982), because his claim involves a controlling issue of law about which substantial ground for difference of opinion exists. Concluding that an immediate appeal might materially advance the ultimate termination of the litigation, the district court granted Radaszewski's alternative motion. This appeal ensued.

ANALYSIS

Determining the propriety of an exercise of personal jurisdiction over a foreign defendant is a two-step process. *Hanline v. Sinclair Global Brokerage Corp.*, 652 F. Supp. 1457, 1458 (W.D. Mo. 1987). The court must determine whether the exercise comports with the requirements of the long-arm statute of the state in which it sits. *See Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653 (8th Cir. 1982). The court also must ensure that sufficient minimum contacts exist between the defendant and the forum state for the exercise of jurisdiction not to offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The Missouri long-arm statute permits personal jurisdiction over a foreign defendant who has committed a tortious act within the state. *See* Mo. Ann. Stat. § 506.500(3) (Vernon Supp. 1988). This statute has withstood constitutional challenge. *See State ex rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889, 892-93 (Mo. 1970) (en banc).

Telecom removed the case to the federal district court for the Western District of Missouri, and then moved for dismissal for lack of personal jurisdiction. Telecom ar-

gued that because it did no business in Missouri and because Contrux was a separate corporation, torts attributable to Contrux did not suffice to extend personal jurisdiction over Telecom under Missouri's long-arm statute.

Ordinarily, Missouri law will protect the separate legal identities of two corporations, even when one corporation owns a part or all of the other. *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 283 (Mo. Ct. App. 1986). If one corporation exercises such control over the other that the latter becomes a mere alter ego of the first, however, and if the formal corporate separateness and arrangements between the two corporations are used to achieve fraud, injustice, or an unlawful purpose, a court may ignore the separate formal corporate structures and "pierce the corporate veil" of the controlling corporation. *Id.* at 284.

Missouri courts have established three requirements for piercing the corporate veil. First, the party seeking to prove that two corporations are not separate entities must show control by one corporation over the other. *Id.* (citing *National Bond Finance Co. v. General Motors Corp.*, 238 F. Supp. 248, 255 (W.D. Mo. 1964)). "Control" in this context means "complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." *Id.* Second, such control must have been used to commit fraud, wrong, a violation of a statutory or other legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights. *Id.* Finally, the control and breach of duty must have proximately caused the injury of which plaintiff complains. *Id.*

Radaszewski alleged that Telecom solely owned Contrux, that Telecom controlled and manipulated Contrux, that Contrux was too inadequately capitalized to function properly, that Telecom and Contrux shared common

officers and directors, that Telecom maintained Contrux's licenses to do business in various states, that Telecom prepared and paid Contrux's taxes, and that Telecom directed Sontrux's day-to-day business affairs. Thus, Radaszewski pleaded sufficient facts to satisfy the first requirement for piercing the corporate veil. *See Collet*, 708 S.W.2d at 284.

The district court found that Radaszewski had failed to establish that Telecom used Contrux to commit fraud, to breach a legal duty, or to violate Radaszewski's legal rights. Radaszewski alleged that Contrux was undercapitalized when incorporated and remained undercapitalized throughout its life. Missouri courts will disregard the existence of a corporate entity that is operated while undercapitalized. *Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379, 387 (Mo. Ct. App. 1987) (citing *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 286-87 (Mo. Ct. App. 1986)). Defendant Telecom, however, denied the allegation that Contrux was undercapitalized.

The matters on which Radaszewski sought discovery from Telecom included Contrux's capitalization. Telecom initially moved to suspend discovery pending the district court's ruling on its motion to dismiss for lack of personal jurisdiction. The district court denied the motion to suspend discovery on June 14, 1988. It ordered the claim dismissed on August 23, 1988. Because the district court concluded that discovery should have been proceeding between June 14 and August 23, 1988, it denied Radaszewski's subsequent motion to reconsider the dismissal based on Radaszewski's inability to obtain discovery sufficient to establish the facts necessary to provide personal jurisdiction.

The district court apparently concluded that further discovery would not enable Radaszewski to obtain evidence sufficient to establish personal jurisdiction because Telecom had served its answers to Radaszewski's opening

interrogatories on August 18, 1988. As Radaszewski notes, however, Telecom's answers consisted primarily of objections to every substantive discovery request that Radaszewski had propounded. Following entry of the district court's order of dismissal, Telecom informed Radaszewski that, in view of the court's order, it would provide no discovery.

Because only four days elapsed between Telecom's serving answers to Radaszewski's interrogatories and the district court's dismissal of the claim, Radaszewski had little realistic opportunity to ascertain through additional discovery whether Contrux had in fact been undercapitalized. We therefore remand the case to the district court with instructions to allow Radaszewski 60 days additional discovery to try to ascertain facts in support of his allegation that Contrux was undercapitalized throughout its existence. Should Radaszewski ascertain such facts, he also will have to show that Telecom's control of Contrux and Contrux's undercapitalization proximately caused his injury in order for the district court to exercise personal jurisdiction over Telecom. *See* Mo. Ann. Stat. § 506.500 (Vernon Supp. 1988); *Collet*, 708 S.W.2d at 284.

We reverse the order of the district court dismissing Radaszewski's claim and remand the case for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 88-0445-CV-W-1

KONRAD RADESZEWSKI,
Plaintiff,

v.

CONTRUX, INC., *et al.*,
Defendants.

ORDER

[Filed Aug. 23, 1988]

Before the court is a motion, filed May 20, 1988, by defendant Telecom Corporation to dismiss plaintiff's claims against it for lack of personal jurisdiction. For the reasons set forth below, the motion will be granted.

FACTS

Plaintiff alleges he suffered damages arising from an accident in which he was struck by a truck driven by defendant Satterfield, an employee of defendant Contrux, Inc., which was a subsidiary of defendant Telecom. In Count II, plaintiff alleges that Telecom was the sole owner and alter ego of Contrux:

> * * * At all times mentioned, the business affairs of defendant Contrux, Inc., were controlled and manipulated by defendant Telecom Corporation and Contrux, Inc. was inadequately capitalized to prop-

erly function in an independant [sic] capacity separate from Telecom Corporation.

12. Defendant Contrux, Inc., was formed by defendant Telecom Corporation for the sole purpose of establishing a common carrier that would function as a non-union company to replace Spector Red Ball, another wholly owned subsidiary of Telecom Corporation that was highly unionized. As such, all of the officers of Contrux were also officers of Telecom Corporation. Telecom maintained Contrux's licenses to do business in various states of the union, prepared and paid taxes owed by Contrux and directed the day[-]to[-]day business affairs of Contrux.

13. As such, defendant Contrux was at all times under such domination of defendant Telecom so as to make Contrux a mere instrument and the alter ego of defendant Telecom each being indistinct from the other.

14. As a result of the foregoing, any corporate distinction between defendants Contrux and Telecom should be disregarded and defendant Telecom Corporation is therefore legally liable for the wrongful acts of defendant Contrux, Inc. and its agents, servants and employees, including those negligent acts set forth in paragraph 7.

15. As a direct and proximate result of the negligent acts of defendants Satterfield, Contrux, Inc. and Telecom Corporation, acting by and through defendant Satterfield and Contrux, Inc., plaintiff Konrad Radeszewski has sustained the permanent and sever damages set forth in paragraph 8 above.

In its motion, Telecom challenges personal jurisdiction. Telecom asserts that it is a Texas corporation which does not do business in Missouri, has no connections to Missouri and therefore is not subject to jurisdiction under the Missouri "long-arm" statute.

Plaintiff responded, on June 9, 1988, that Contrux was a mere instrumentality of Telecom. Plaintiff argues that, as the alter ego of Contrux, Telecom is subject to jurisdiction under the long-arm statute by having committed a tortious act within the Missouri.

DISCUSSION

Determining the propriety of an exercise of personal jurisdiction over a non-resident defendant is a two-step process. *Hanline v. Sinclair Global Brokerage Corp.*, 652 F.Supp. 1457, 1458 (W.D.Mo. 1987). First, the court must determine that the exercise comports with the requirements of the long-arm statute of the state in which it sits. *See Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653 (8th Cir. 1982). Second, the court must ensure that minimum contacts exist between each defendant and the forum state such that the exercise of personal jurisdiction does not offend the notions of fair play and substantial justice under the due-process clause. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The Missouri long-arm statute, Mo.Ann.Stat. Section 506.500 (Vernon Supp. 1988), confers jurisdiction over a person as to any cause of action arising any of several means. Those include, among others, the commission of a tortious act within the state. The scope of the statute was meant to be as broad as is consistent with the dictates of due process. *Hanline v. Sinclair Global Brokerage Corp., supra; See, State ex rel. Deere and Co. v. Pinnell*, 454 S.W.2d 889, 892 (Mo.1970) (*en banc*).

Plaintiff, the party that is seeking to invoke federal jurisdiction, has the burden of establishing that jurisdiction exists, and this burden may not be shifted to the party challenging the jurisdiction. *Hanline v. Sinclair Global Brokerage Corp., supra*, at 1458-1459; *United States v. Bliss*, 108 F.R.D. 127, 129 (E.D.Mo. 1985); *Mountaire Feeds, Inc. v. Agro Impex, S.A., supra*, 677

F.2d at 653. The plaintiff's complaint must allege sufficient facts "to support a reasonable inference that the defendant can be subjected to the jurisdiction within the state." *Hanline v. Sinclair Global Brokerage Corp., supra, quoting Institutional Food Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 453 (8th Cir. 1984). While the facts are viewed in the light most favorable to the plaintiffs, "there must nonetheless be some evidence upon which a prima facie showing of jurisdiction may be found to exist. . . ." *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977) (citations omitted); *United States v. Bliss, supra*, at 129.

Telecom's motion does not challenge whether a prima facie showing of a tortious act has been made in the petition. Rather, Telecom challenge whether there has been a showing that it was Telecom, which committed the tort. Plaintiff bases his claim of jurisdiction upon Telecom's control over Contrux, alleging that Telecom is the alter ego of Contrux and therefore is subject to jurisdiction if a Contrux employee committed a tortious act in Missouri. The linchpin is whether Telecom and Contrux are separate corporations.

If a subsidiary's presence in the state is primarily to carry on its own business and the subsidiary has preserved some semblance of independence from the parent, jurisdiction over the parent may not be acquired on the basis of local activities. *United States v. Bliss, supra*, at 131. There is a presumption of corporate separateness that must be overcome by clear evidence that the parent in fact controls the activities of the subsidiary. *Ibid.* A court may not exercise jurisdiction solely because a parent owns all the stock of its subsidiary. *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980); *Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 335 (1925).

Courts have applied different tests in determining whether two corporations are sufficiently separate to preclude jurisdiction over the parent corporation. In *United States v. Bliss*, *supra* at 131, the court said the plaintiff at least must demonstrate that the defendants did not maintain corporate formalities. In the same case, the court quoted from *Thunderbird Motor Freight Lines v. Consolidated Pipe & Supply*, No. 83-1791 (E.D.Mo. October 23, 1983), where the court had focused on the parent's lack of control over day-to-day operations. Plaintiff relies upon a test he calls the "instrumentality" theory and quotes *Acme Precision Products Inc. v. American Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir. 1970):

> . . . [T]he law is clear that where a subsidiary corporation acts as a direct instrumentality of and indirect cooperation with its parent corporation, and where the properties and affairs of the two are so inextricably confused as to a particular transaction, the corporate structures cannot exist separate from one another.

Nevertheless, this court feels bound by a more recent pronouncement by the Eighth Circuit Court of Appeals, wherein the long-arm statute was applied according to more reecnt Missouri case law. In *A.L. Laboratories, Inc. v. Philips Roxane*, 803 F.2d 378, 385 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1632 (1987), the court considered whether a parent company could be held responsible for the tortious acts of its subsidiary:

> Corporate forms may be disregarded and separate entities treated as one only where a two-prong test is met: "Not only must the corporation be controlled and influenced by one or a few persons, in addition, the evidence must establish that the corporate cloak was used as a subterfuge to defeat public convenience, to justify wrong or to perpetuate fraud." *Fairbanks v. Chambers*, 665 S.W.2d 33, 37 (Mo.Ct.

> App. 1984). Thus, full ownership, with concomitant dominance and control, is insufficient to justify "piercing the corporate veil"; rather, a plaintiff must prove that equity requires that the parent and subsidiary be treated as one. *Camelot Carpets v. Metro Distrbuiting Co.*, 607 S.W.2d 746, 749-750 (Mo.Ct. App. 1980) (quoting *Lawton-Byrne-Bruner Insurance Agency Co. v. Stiers Brothers Construction Co.*, 186 S.W.2d 480, 484-485 (Mo.Ct.App. 1945)) *see also, Community Title Co. v. Roosevelt Federal Savings & Loan Association*, 670 S.W.2d 895, 905 n.8 (Mo.Ct.App. 1984) (dicta).

Plaintiff attempted in the petition to show that Contrux was so completely dominated by Telecom that Contrux was the alter ego of Telecom. The allegations are that Telecom controlled and manipulated Contrux, which was too inadequately capitalized to function properly. The petition alleges that Telecom maintained Contrux's licenses to do business in various states, prepared and paid the taxes owed by Contrux, and conducted the day-to-day business affairs of Contrux. Such allegations would appear to satisfy the first part of the test applied in *A.L. Laboratories, Inc. v. Philips Roxane, supra.*

The second part of the test is somewhat more troublesome. The petition alleges that Contrux was established by Telecom for the sole purpose of establishing a common carrier that would function as a non-union company to replace Spector Red Ball. Spector Red Ball was another wholly owned subsidiary of Telecom and was "highly unionized," according to the petition. The presence of this allegation in the petition and in plaintiff's opposition to the motion may imply that plaintiff believes something is wrong about forming a corporation for such a purpose. However, among all the reasons for forming a corporation, there is nothing patently improper about the alleged purpose in forming this corporation.

This court is unable to find, on the basis of what is before it, that Contrux was created and operated such that "the corporate cloak was used as a subterfuge to defeat public convenience, justify wrong, or perpetuate fraud." The closest plaintiff comes to establishing some improper purpose in forming Contrux is his allegation that Contrux was undercapitalized.

Where a company is operated without sufficient funds to meet obligations to those who must deal with it, that would be circumstantial evidence tending to show either improper purpose or reckless disregard of the rights of others." *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 54-55 (Mo. 1937). Telecom denies plaintiff's allegation of under capitalization. As stated above, the burden is upon the plaintiff to establish jurisdiction. On this point, plaintiff has not met the burden in regard to defendant Telecom.

CONCLUSION

In the absence of sufficient allegations of a prima facie case that Telecom committed a tortious act in Missouri, the court can find no personal jurisdiction over Telecom on that basis.

It is

ORDERED that defendant Telecom Corporation's motion, filed May 20, 1988, to dismiss is granted. It is further

ORDERED that plaintiff's claims against Telecom Corporation are dismissed.

/s/ Dean Whipple
DEAN WHIPPLE
United States District Judge

DATED: AUGUST 23rd, 1988.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1342/1343WMKC

KONRAD RADASZEWSKI, ETC.,
Appellant/Cross-Appellee,

vs.

CONTRUX, INC., *et al.*,
Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Western District of Missouri

The petition for rehearing is denied.

December 14, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit